



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2006

Law Offices of Brian J. Neary
190 Moore Street
Hackensack, New Jersey 07601

RE: MUR 5444
National Democratic Congressional
Committee and Marcus T. Belk, in
his personal and official capacities
as Treasurer

Dear Mr. Neary:

On April 29, 2004, the Federal Election Commission notified your clients, the National Democratic Congressional Committee ("NDCC") and Marcus T. Belk, as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon review of the allegations contained in the complaint, the Commission, on December 9, 2004, found that there is reason to believe that the National Democratic Congressional Committee and Marcus T. Belk, as treasurer, knowingly and willfully violated 2 U.S.C. § 441h(b), a provision of the Act. The Commission also found reason to believe the National Democratic Congressional Committee and Belk, as treasurer, violated 2 U.S.C. §§ 433 and 434, 441a(a)(1)(c), and 432(b)(3). The Factual and Legal Analysis, which formed a basis for the Commission's findings, was forwarded to your client at that time.

Based upon additional information obtained during the ensuing investigation, the Commission, on September 26, 2006, found that there is reason to believe that the NDCC and Belk, in his personal and official capacities as Treasurer, knowingly and willfully violated 2 U.S.C. §§ 432(b)(3), 433, 434, 441a(a)(1)(C), and 441h(a), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

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If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,



Michael E. Toner
Chairman

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: National Democratic Congressional Committee MUR 5444
and Marcus T. Belk, in both his personal
capacity and official capacity as Treasurer

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission"). *See* 2 U.S.C. § 437g(a)(1). In the complaint, the Democratic Congressional Campaign Committee ("DCCC") alleges that Marcus T. Belk violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by fraudulently misrepresenting himself as acting on behalf of the DCCC for the purpose of soliciting contributions and operating a political committee without registering and reporting. Specifically, the complaint alleged that, on or around February 6, 2004, the Ford Motor Company Civic Action Fund issued a \$15,000 check payable to an organization calling itself the "National Democratic Congressional Committee" ("NDCC"), a political committee registered by Marcus T. Belk.¹ The complaint states that, on information and belief, the \$15,000 check was intended as a contribution to the DCCC. The DCCC attached a copy of the front and back of the check to the complaint. The DCCC stated that it was not aware of the circumstances that caused the check to be made payable to the NDCC or to enter Belk's possession. A review of the Commission's disclosure reports revealed that, with the exception of 2004, the DCCC received contributions from the Ford Motor Company Civic Action Fund every year since 1997. The complaint further alleges

¹ The check was actually made payable to the "National Democratic Congressional Cmte."

that Belk may have operated the NDCC as a political committee without registering and reporting with the Commission.

At the time of the complaint, there was also information that in 2003, Belk registered multiple committees with the Commission, including his own candidate campaign committees for the 2004 U.S. Senate race in South Carolina and a House seat in New Jersey. Besides these two committees and the NDCC, the other committees registered by Belk were Defeat the Republican House, Defeat Bush-Cheney '04, Democratic Majority 2004, National Democratic Senatorial Committee, and National Democratic Political Committee. Some of these committee names registered by Belk could be confused with certain national party committees. Except for Belk US Senate 2004, Belk's South Carolina Senate committee, none of Belk's committees ever reported receiving contributions or making disbursements, and Belk filed termination reports for them in September and October 2003.

Based upon this information, particularly, the fact that Mr. Belk created a political committee with a name – the National Democratic Congressional Committee – that can be easily confused with the Democratic Congressional Campaign Committee, accepted a contribution in an amount (\$15,000) that only a national party committee was permitted to accept, and failed to respond to the complaint, the Commission previously found reason to believe that NDCC and Belk violated 2 U.S.C. §§ 432(b)(3), 433, 434, 441a(a)(1)(c), and 441h(b).

Based upon evidence obtained during the investigation, the Commission now finds reason to believe that the National Democratic Congressional Committee and Marcus T. Belk, in both his personal and official capacities as treasurer, knowingly and willfully violated 2 U.S.C. §§ 432(b)(3), 433, 434, 441a(a)(1)(C), and 441h(a).

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II. FACTUAL AND LEGAL ANALYSIS

A. Facts

The investigation revealed that on March 9, 2004, shortly after receiving the \$15,000 check from Ford, Belk opened a business checking account at a Bank of America branch in South Carolina in the name of "Marcus T. Belk dba NDCC." On the same day and at the same bank, he also opened a personal checking account solely in his name. On March 10, 2004, Belk deposited the \$15,000 check from Ford into the business checking account by endorsing it with his own name. He never made any other deposit to the business checking account. Thereafter, from March 17, 2004 to April 6, 2004, Belk made six electronic payments from the business checking account to a web hosting company. Beginning on April 5, 2004, Belk made five online transfers totaling \$14,652.45 from the business checking account into his newly opened personal checking account, leaving by the end of April a balance of \$90 in the business checking account.

From April 2004 until the end of July 2004, Belk used the newly transferred funds in his personal account to make cash withdrawals from ATMs, purchase consumer goods at retail stores and on the Internet, make utility and car payments, pay for rental cars and airline tickets, and make various other purchases in addition to writing a handful of checks to unknown payees. Belk's personal checking account received a few other deposits in this time, primarily in the form of direct deposit salary payments from Macy's Department Store, but by the middle of July 2004, Belk's personal checking account had a negative balance and it closed at the end of July.

At the same time that he deposited the Ford check, Belk was a candidate for the U.S. Senate in South Carolina, and his authorized committee, Belk US Senate 2004, was active. The NDCC did not re-register with the Commission when it received the \$15,000 contribution.

B. Analysis

As noted in the previous Factual and Legal Analysis regarding this matter, the facts in this case raise the question of whether by receiving the \$15,000 contribution after having terminated the NDCC's status as a political committee, the NDCC and Belk may have violated: (1) 2 U.S.C. §§ 433 and 434 by operating a political committee without registering and reporting; (2) 2 U.S.C. § 441a(a)(1)(C) by accepting a contribution that was excessive by \$10,000; and (3) 2 U.S.C. § 432(b)(3) by commingling the contributed funds with Belk's personal funds. Also, the facts of this matter raise the question of whether Belk, then a candidate for the U.S. Senate, knowingly and willfully misrepresented himself as acting on behalf of the Democratic Congressional Campaign Committee for the purpose of soliciting contributions in violation of 2 U.S.C. § 441h(a).

Section 441h(a) prohibits any person who is a candidate or an employee or agent of such candidate from fraudulently misrepresenting himself as speaking, writing, or acting for or on behalf of another candidate or party on a matter that is damaging to that candidate or party.² Here, there is no question that Belk was a candidate at the time of the activities herein and that the misdirection of the \$15,000 contribution was damaging to the DCCC. Further, evidence obtained during the investigation suggests that Belk used the NDCC to fraudulently misrepresent that it was acting for or on behalf of the DCCC.

² "Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort action..." and therefore proof of justifiable reliance and damages is not necessary. *See* Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg. 76,969 (Dec. 31, 2002); *Neder v. United States*, 527 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)). Indeed, in the context of 2 U.S.C. § 441h(a), the term "damaging" extends so far as to cover matters that are politically damaging to the damaged candidate or party. *See, e.g.*, MUR 4919 (East Bay Democratic Committee). Nevertheless, where, as here, the damage to the aggrieved committee is financial in nature, the statutory term "damaging" obviously also applies. (Although the DCCC eventually did receive a \$15,000 contribution from the Ford PAC, it did not receive the contribution until 133 days after the original check was cut, and thus lost the time value associated with having the contribution for that length of time.)

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First, Belk created several political committees with names that could easily be confused with a national party committee, including the name – National Democratic Congressional Committee – which can be easily confused with the Democratic Congressional Campaign Committee, and accepted a contribution from Ford in an amount (\$15,000) that only a national party committee was permitted to accept. In fact, Ford intended to make a contribution to the DCCC but mistook the NDCC for the DCCC using a list of registered political committees from a computer database. Second, upon receiving the \$15,000 contribution from Ford, Belk opened a bank account in the name of the NDCC in order to deposit the funds and transfer them to his personal bank account and, after making the transfers, spent the money on personal expenses. Third, the Commission sought relevant information from Belk and offered him the opportunity to respond to the previous reason to believe findings, but he asserted the Fifth Amendment and refused to answer questions about the NDCC, including how he came to possess the \$15,000 check from Ford and what he did with the money, on the grounds that his answers might incriminate him.

The misleading name of the NDCC and Belk's diversion to his personal use of funds not intended for either himself or the NDCC as well as the adverse inference to be drawn from Belk's assertion of the Fifth Amendment, make it appear that Belk used the NDCC to defraud potential donors and cause them to make contributions to the NDCC with the misimpression that they were contributing to the DCCC.³ The adverse inference rule provides a tool for courts and agencies to infer that when a party fails to produce relevant information within his or her control, then the information is unfavorable to that party. *See Baxter v. Palmigiano*, 425 U.S. 308, 318

³ Courts have held that even absent an express misrepresentation, a scheme devised with the intent to defraud is still fraud if it was reasonably calculated to deceive persons of ordinary prudence and comprehension. *See U.S. v. Thomas*, 377 F.3d 232, 242 (2nd Cir. 2004), citing *Silverman v. U.S.*, 213 F.2d.

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(1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . ."); *see also SEC v. International Loan Network, Inc.*, 770 F. Supp. 678, 695-696 (D.D.C. 1991), *aff'd*, 968 F.2d 1304 (D.C. Cir. 1992) (adverse inference drawn from defendants' assertion of their Fifth Amendment right not to testify during depositions); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986) (agency did not err in taking into account adverse inference based on broker-dealer's invocation of Fifth Amendment privilege against self-incrimination); *Cerrone v. Shalala*, 3 F. Supp. 2d 1174, 1175 n.3, 1180 (D. Colo. 1998) (agency's finding, based in part on adverse inference drawn against disability benefit recipient who invoked the Fifth Amendment, was supported by substantial evidence).

Further, the fact that Belk's activities may have been intentionally designed to mislead reasonable people suggests that the violations may have been knowing and willful. The knowing and willful standard requires knowledge that one is violating the law. *See Federal Election Comm'n v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986). Proof that a defendant acted deliberately and with knowledge that the representation was false may establish a knowing and willful violation, and a jury may infer that a defendant's acts were knowing and willful from the defendant's elaborate scheme to disguise his actions. *See United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990).

Based on the foregoing, there is reason to believe that the NDCC and Marcus T. Belk, in both his personal and official capacities as treasurer, knowingly and willfully violated 2 U.S.C. § 441h(a). Further, there is reason to believe that the NDCC and Marcus T. Belk, in both his personal and official capacities as treasurer, knowingly and willfully violated 2 U.S.C. §§ 433 and 434 by failing to re-register as a political committee once the Committee received a

contribution in excess of \$1,000 and by failing to file disclosure reports with the Commission thereafter. In addition, there is reason to believe the National Democratic Congressional Committee and Marcus T. Belk, in both his personal and official capacities as treasurer, knowingly and willfully violated 2 U.S.C. § 441a(a)(1)(C) by accepting a contribution that was excessive by \$10,000, and knowingly and willfully violated 2 U.S.C. § 432(b)(3) by commingling the contributed funds with Belk's personal funds.